In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1871

ARNOLD DANIEL NOGA AND ROBERT HENRY VALEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the admission of testimony by two witnesses concerning the use of narcotics at the time the alleged offenses were commited was plain error.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of theft and knowing receipt of stolen goods moving in interstate commerce, in violation of 18 U.S.C. 659, conspiracy to possess stolen goods, in violation of 18 U.S.C. 371, and willful destruction of property moving in interstate commerce, in violation of 15 U.S.C. 1281. Petitioners Noga and Valez were sentenced to terms of four and five years' imprisonment, respectively. The court of appeals affirmed (Pet. App. A).

The government's case was developed largely through the testimony of co-conspirators McAllister and Baldwin, who pleaded guilty. In early September 1972, petitioners, McAllister, and Baldwin planned to rob a furniture warehouse in the Detroit area. As part of the plan, petitioner Noga, McAllister, and Baldwin stole a truck and trailer. The trailer proved to be loaded with furniture, which they and petitioner Valez sought to unload at a house in St. Clair Shores, Michigan. The police halted the unloading because that house had been condemned. The four then unloaded the furniture at a house in Brighton, Michigan, belonging to Noga's sister, after which they drove the truck and trailer to an open field and set them afire. Thereafter, McAllister informed the Michigan State Police of these activities and the four men were arrested as they were moving the stolen goods from Brighton to Detroit (Pet. 3-5; Pet. App. A, p. 16).

Co-conspirator McAllister testified that on the night the four planned to steal a truck and trailer, they all got "stoned." Thereafter, they went to petitioner Valez' home and had "some different kind of narcotics" and then went to the Art Van store, following which they returned to the Valez residence and "smoked some grass" (Pet. App. A, p. 16). At this point, petitioners' counsel objected that the gratuitous remarks of the witness were irrelevant and requested that the court instruct the jury to disregard the remarks. The court overruled the objection, saying that it was "possible they could have some relationship to the state of mind of the parties." The court did, however, caution the jury with respect to these remarks, stating (Pet. App. A, p. 17):

> They're irrelevant for any other purpose, however, and should be considered only to the extent they might bear upon the state of mind of the persons * * * or their ability to remember events or matters of that nature.

Later during the trial a second co-conspirator, Baldwin, testified that the four had met at a bar where the burglary of the furniture warehouse was planned. When the prosecutor asked the purpose of the meeting, he replied, "I think it was to buy or sell some narcotics." There was a defense objection and, at the government's request, the answer was stricken (Tr. 11-12). Baldwin then testified that all four men were using narcotics. The assistant asked if it were not possible that this was only a tranquilizer. A defense objection to this question as leading was sustained (Pet. App. A, p. 19). There was further testimony by Baldwin that the men used some "grass" and that he took some "speed" to keep himself awake (Pet. App. A, p. 18). There was no objection to this testimony.

The only objection was to McAllister's testimony and it was on the ground of its alleged irrelevancy. On this point, the trial court delivered a cautionary instruction. Petitioners now urge that "the prejudice which such testimony would engender in the jury would far outweigh any probative value that such evidence would have" (Pet. 9). In making only this new objection, petitioners do not argue that the state of mind of the parties at the time, as well as the witnesses' ability to relate the course of events, were irrelevant matters for consideration by the jury. In fact, petitioners urged in closing argument that the prosecution witnesses were unreliable because of their drug use (Pet. App. A, p. 18). This testimony was relevant and constituted an integral part of an accurate account of the entire episode. The trial court's conclusion that the testimony was probative and that its possible prejudicial effects did not outweigh its probative value was correct and, in any event, did not constitute plain error. See, *e.g.*, *United States* v. *Deaton*, 381 F. 2d 114, 117 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.